

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA  
AT CHARLESTON

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x  
FRANK MORGAN, : Civil Action  
: Plaintiff, : No. 2:18-cv-01450  
: v. : Date: March 4, 2024  
: OFFICER J. D. TINCER, et al., :  
: Defendants. :  
\_\_\_\_\_  
x

TRANSCRIPT OF MOTIONS HEARING HELD  
BEFORE THE HONORABLE THOMAS E. JOHNSTON, CHIEF JUDGE  
UNITED STATES DISTRICT COURT  
IN CHARLESTON, WEST VIRGINIA

APPEARANCES:

For the Plaintiff: KERRY A. NESSEL, ESQ.  
The Nessel Law Firm  
519-1/2 Eighth Street  
Huntington, WV 25701

ABRAHAM J. SAAD, ESQ.  
Saad Law Office  
P. O. Box 1638  
Huntington, WV 25717-1638

For the Defendants: WENDY E. GREVE, ESQ.  
Pullin Fowler Flanagan Brown &  
Poe  
901 Quarrier Street  
Charleston, WV 25301

WILLIAM R. SLICER, ESQ.  
Shuman Mccuskey & Slicer  
P. O. Box 3953  
Charleston, WV 25339

Court Reporter: Ayme Cochran, RMR, CRR

Proceedings recorded by mechanical stenography;  
transcript produced by computer.

1                   PROCEEDINGS had before The Honorable Thomas E.  
2                   Johnston, Chief Judge, United States District Court,  
3                   Southern District of West Virginia, in Charleston, West  
4                   Virginia, on March 4, 2024, at 1:00 p.m., as follows:

5                   COURTROOM DEPUTY CLERK: The matter before the  
6                   Court is *Frank Morgan versus Officer Tucker, et al.*, civil  
7                   action number 2:18-cv-01450, scheduled for a motions  
8                   hearing.

9                   THE COURT: Good afternoon. Will counsel please  
10                  note their appearances?

11                  MR. NESSEL: Good afternoon, Your Honor. Kerry A.  
12                  Nessel for the plaintiff, Frank Morgan.

13                  MR. SAAD: Abraham J. Saad for the plaintiff,  
14                  Frank Morgan.

15                  MS. GREVE: Wendy Greve and Will Slicer for the  
16                  defendant, Tincher.

17                  THE COURT: Mr. Slicer, I don't recall you having  
18                  the pleasure of being here for the trial almost four years  
19                  ago. Are you -- what capacity do you appear in today?

20                  MR. SLICER: I will be taking over the case for a  
21                  discovery period and the trial.

22                  THE COURT: All right. So, very well.

23                  All right. We are here today on -- in the wake of the  
24                  Fourth Circuit's decision on plaintiff's renewed motion for  
25                  sanctions.

1                   Mr. Nessel, I will hear from you, but my first question  
2 is how does Rule 11 apply in this situation?

3                   MR. NESSEL: Well, Your Honor, just the overall  
4 misconduct.

5                   THE COURT: Well, that's not how Rule 11 works.  
6 Rule 11 has to do with signing certain things. And what is  
7 it that Ms. Greve signed here that Rule 11 applies to?

8                   MR. NESSEL: She signed a Certificate of Service  
9 denoting discovery responses. She --

10                  THE COURT: Have you read Rule 11?

11                  MR. NESSEL: Yeah. I've got it right in front of  
12 me. I understand what it states, Your Honor.

13                  THE COURT: Rule 11 says it doesn't apply to  
14 discovery responses.

15                  MR. NESSEL: Okay.

16                  THE COURT: So, how does Rule 11 apply in this  
17 situation?

18                  MR. NESSEL: Okay. Well, nix that, Your Honor.  
19 We'll get rid of Rule 11 and focus on Rule 37.

20                  THE COURT: All right. Good. Save us some time.

21                  MR. NESSEL: If that's where you were going to.  
22 And I understand.

23                  THE COURT: Well, I mean, the rule says what it  
24 says.

25                  MR. NESSEL: I understand, sir, yes.

1 THE COURT: All right. So, Rule 37.

2 MR. NESSEL: Yes, Your Honor. Do you want me to  
3 continue?

4 THE COURT: Please proceed.

5 MR. NESSEL: Your Honor, I believe it's been  
6 briefed thoroughly by and through my motions, as well as my  
7 replies, so on and so forth, that were all before this  
8 Court, the first one of which was the second -- I guess it  
9 would be the second to last day of the trial in June --  
10 excuse me, July 30th, 2020. The day before this Court  
11 informed me to file what I needed to file in regard to the  
12 nondisclosure and Rule 26 violation.

13                   The nondisclosure, of course, was regarding a *Travis*  
14                   *Fortune* matter. I got up early that morning, as I always  
15                   do, at I think 6:22 a.m., prior to arriving --

18 MR. NESSEL: Yeah.

19 THE COURT: I've read your briefing. I've read  
20 their response. What's your response to their arguments  
21 regarding the Rule 37 motion?

22 MR. NESSEL: Well, I filed a reply to that  
23 response and I believe it speaks for itself, as well. The  
24 Court's -- I filed it. It was timely filed.

25 First of all, it says -- well, would you like me to go

1 through it, or is the Court familiar with it?

2 THE COURT: I'm familiar with it, but they raise  
3 some arguments that suggest that Rule 37 sanctions aren't  
4 available and I just want to hear, here and now, what your  
5 response is to that.

6 MR. NESSEL: Okay. Well, Your Honor, I believe,  
7 and I stated before, that they are. First of all, they  
8 address me not complying with Rule 37. As I stated, this  
9 Court ordered me to file something. I did so. So,  
10 therefore, that issue is covered.

11 And basically, Your Honor, let me pull Rule 37 out of  
12 my -- failure to disclose to supplement an earlier response  
13 or to admit, so on and so forth, Rule 37.

14 Your Honor, they failed to disclose things. The Fourth  
15 Circuit found that to be misconduct. They relied on Rule  
16 26. Rule 26 states it is an ongoing process. You need to  
17 file things. You need to supplement things, most  
18 importantly. That was not done. That caused Mr. Saad and I  
19 and our respective offices to have to spend an exorbitant  
20 amount of time.

21 So, Rule 37 governs it due to the fact that a failure  
22 to disclose or supplement under Rule -- that rule under  
23 (c) (1), but it specifically addresses Rule 26(a), which is  
24 what's applicable here and -- 26(e) is the one, Your Honor,  
25 and it includes attorney's fees, expenses, so on and so

1 forth under that rule. That's exactly what we have here.

2 In regard to their response, in my reply I specifically  
3 state that, yes, misconduct did occur due to Rule 26 and the  
4 Fourth Circuit found the same. That was their ruling. I'm  
5 relying on not only the rule, but what the Fourth Circuit  
6 basically ordered. So, that's why we're here today in that  
7 regard, Your Honor.

8 And I believe that sanctions are in order due to  
9 attorney's fees and expenses expended because, again, we  
10 spent an exorbitant amount of time -- pretty much spent an  
11 exorbitant amount of time and resources on something that  
12 should have been given to us prior to the trial. I do not  
13 need to belabor that point because that is the main point.

14 So, that's where we rest, Your Honor. I'll respond to  
15 Ms. Greve, should I -- should need be.

16 THE COURT: All right. Ms. Greve?

17 MR. NESSEL: Thank you, sir.

18 MS. GREVE: Thank you, Your Honor. The -- we  
19 raised procedural deficiencies with the plaintiff's motion,  
20 but if I may go forward without leaving any procedural  
21 arguments that we have, just with the substance.

22 The first is perhaps the most disturbing professionally  
23 to me and that is that plaintiffs have filed a request with  
24 this Court that it order Rule 11 sanctions against counsel  
25 for what they term as suborning perjury.

4 MS. GREVE: Your Honor, we completely agree with  
5 you. With respect to the discovery issue, plaintiff's  
6 counsel added an argument in this motion which they term a  
7 renewed motion for sanctions, but what they've done is  
8 they've added a count in there arguing that the defendant,  
9 Tincher, perjured himself during the underlying trial. That  
10 was not any -- that was not part of any of the briefing  
11 prior to this motion and --

14 MS. GREVE: Correct. And then plaintiff's counsel  
15 represented in his motion that I suborned perjury and --

16 THE COURT: I think that can be implied from the  
17 Fourth Circuit opinion.

18 MS. GREVE: I agree. Now, what the Fourth Circuit  
19 didn't have, but what this Court does have, is the  
20 definition of perjury, because it wasn't briefed before the  
21 Fourth Circuit, and suborning perjury. That also wasn't  
22 briefed before the Fourth Circuit and it wasn't -- also was  
23 not part of the briefing or the argument.

24 It is what -- what we have in plaintiff's counsels'  
25 motion is just what he took out of the order without any law

1 and I think we need to start with the law.

2 First of all, what is perjury? The argument the  
3 defendant, Tincher, lied on the stand with respect to *Meade*.  
4 In order for there to be perjury you have to have a willful  
5 -- I apologize, Your Honor. The statement --

6 THE COURT: Well, I'm going to stop you right  
7 there because I know what perjury is and I know what  
8 suborning perjury is and the fact of the matter is the  
9 Fourth Circuit also suggested that there should be a period  
10 of discovery and, frankly, I think that is a topic that is  
11 ripe for that period of discovery. What did Tincher know?  
12 What did he not know? And what did you do? And what did  
13 you -- and what did you know before he testified? All, I  
14 think, all are subjects that are ripe for discovery.

15 MS. GREVE: Thank you, Your Honor. In order for  
16 there to be suborning perjury the individual attorney has to  
17 actually procure it. There are no allegations in the motion  
18 before this Court that there were any statements made by  
19 Defendant Tincher on the stand during trial in response to  
20 any questioning by me. And I would also like to note for --  
21 with reference to the record the *Meade* case, which is also  
22 pending before this Court, and is at 2:19-cv-00647. At ECF  
23 40, the Court will note that Lonnie Simmons withdrew as  
24 counsel. I am an officer of this Court and I will represent  
25 to this Court that Lonnie Simmons, in May of 2020, said that

1 he was going to be withdrawing the entire *Meade* suit. He  
2 withdrew as counsel just prior to the trial in this case  
3 because *Meade* would not agree to voluntarily dismiss. In  
4 September of 2020 Tony *Meade* voluntarily dismissed the  
5 remainder of his case.

6 I would respectfully request that this Court deny  
7 plaintiff's motion directed to me for suborning perjury  
8 because not -- even if there -- there is no factual  
9 allegations in plaintiff's motion that would support the  
10 legal definition of suborning or perjuring, and we believe  
11 that the facts that are part of a public record here  
12 indicate that Mr. -- or then Deputy Tincher was aware that  
13 plaintiff's counsel, Lonnie Simmons, was withdrawing and did  
14 withdraw.

15 THE COURT: Well, we'll see.

16 MS. GREVE: Okay. Thank you, Your Honor.

17 And I will move on then to the --

18 THE COURT: And I'm not striking anything.

19 MS. GREVE: Okay. The -- then I will move on to  
20 the Rule 37 argument. The -- I'd note that the Court  
21 actually issued two orders. One is at ECF 204; the other  
22 was addressing the Rule 60(b). Plaintiff's counsel filed  
23 two motions, which explains the two orders.

24 During the trial plaintiff's counsel asked this Court  
25 to award sanctions for the failure to supplement discovery

1 specific to the *Fortune* complaint. As this Court's aware, I  
2 did not supplement any discovery at all because I believed  
3 that we didn't have to. Now, that was absolutely incorrect,  
4 but it was a legitimate belief that I held that was founded  
5 in the legal argument at the time I failed to supplement the  
6 discovery. It wasn't a withholding of the *Fortune*  
7 complaint, which was a public record. It wasn't withholding  
8 that complaint.

9 THE COURT: It doesn't matter if it's a public  
10 record. It's still subject -- you were still subject to  
11 discovery obligations. This business that it's a public  
12 record is a total red herring and is not going to get you  
13 off the hook for this.

14 MS. GREVE: Thank you, Your Honor.

15 So --

16 THE COURT: You're welcome. And don't talk back  
17 to me.

18 MS. GREVE: I apologize, Your Honor. That was not  
19 my intent.

20 The failure to supplement was not an intentional  
21 withholding of one piece of evidence. It was a failure to  
22 supplement based on a mistaken but truly held belief in what  
23 the law was and how it was to be applied and I am not here  
24 to say that I was right. I am here to say that I believed  
25 that I was right and I had a legal basis for that belief and

1 I had a factual basis for that belief.

2 This Court, in its order under 204, which was not  
3 appealed, this Court held that the plaintiff engaged in  
4 misconduct in violating the Court's order requiring it to  
5 issue discovery requests within the time frame. I failed to  
6 supplement discovery responses to discovery that I didn't  
7 have to answer.

8 The Fourth Circuit in its opinion held that if I answer  
9 them I had to affirmatively raise the timeliness objection.  
10 I did not affirmatively raise the timeliness objection.  
11 That does not negate my good faith basis in my legal  
12 argument to explain why none of the discovery was  
13 supplemented, Your Honor.

14 With regard to the application of Rule 37 sanctions  
15 and/or fees, I'm sure the Court is fully aware that the  
16 Fourth Circuit has a -- well, they have a four-part test and  
17 whether or not the non-complying party acted in bad faith is  
18 a critical element of that, Your Honor. The Fourth Circuit  
19 did not find that the misconduct for a Rule 60 analysis was  
20 intentional misconduct. It specifically did not find that  
21 it was intentional. It also did not find that it was  
22 unintentional.

23 But this Court's prior orders and this Court's dealing  
24 with the undersigned, this Court certainly has a record  
25 before it to support the finding that none of defense

1       counsel's conduct was in bad faith and intentional  
2       misconduct.

3               The briefing before this Court and consistent with this  
4       Court's orders establishes that there was a legitimate legal  
5       argument for defense counsel's position. The fact that I  
6       was determined to be wrong is not tantamount to a finding  
7       that I acted in bad faith, Your Honor. That is one of a  
8       multitude of elements of the four elements that the Fourth  
9       Circuit does review with the application of Rule 37.

10              The -- the request for attorney's fees is not fully set  
11       forth in plaintiff's counsels' brief. Plaintiff's counsel  
12       has just said they have -- they have exorbitant attorney's  
13       fees. I believe the standard is actually reasonable  
14       attorney's fees, but it also has to be directly related to  
15       work -- well, Your Honor knows what the test is.

16              The Court in its discretion can refuse to award  
17       sanctions. This Court, when faced with the issue before,  
18       had determined that defense counsel had a duty to supplement  
19       and failed to meet that duty, that plaintiff's counsel had a  
20       duty to comply with this Court's order, and plaintiff's  
21       counsel failed to comply with that duty. And in the order  
22       at ECF 204 the finding was that there were no sanctions to  
23       be awarded.

24              This is no different now than it was then. Plaintiff's  
25       counsel is going to receive a new trial and plaintiff can

1 try their case. There was no intentionality and there was  
2 no bad faith, Your Honor, and we respectfully request that  
3 this Court deny the plaintiff's motion. Thank you.

4 THE COURT: One thing you didn't mention is your  
5 request for attorney's fees against plaintiff's counsel for  
6 filing this motion, which I have to say in my 18 years as a  
7 judge, wins the chutzpah prize, and that will be denied.

8 The -- Mr. Nessel, do you have anything to add?

9 MR. NESSEL: Briefly, Your Honor. Basically just  
10 a brief response or reply to her. She keeps harping on the  
11 fact that we were nine days late in filing discovery  
12 requests. Once she answered them, she's in for Rule 26. I  
13 didn't say that. Those three wise people in Richmond stated  
14 that. So, that's not -- that's not my standard. My  
15 argument, but they affirmed that, or they agreed with me.

16 An intentional non-supplemental that she, Ms. Greve,  
17 stated there is no factual or legal bases for her to turn  
18 the *Fortune* stuff over to me. By the way, she kept focusing  
19 on me, which is not really what this is about. We knew  
20 about me. That's not going to cut it either. So, there's  
21 no argument there.

22 Another thing about Rule 37, Your Honor, is the  
23 deterrence that makes sure these things don't happen again.  
24 I think that the Court stated it very wise on July 29th.  
25 "Don't give me that look because you have a duty to

1 supplement. Okay?" The Court, this is you, Your Honor.

2 You stated this. "If he" --

3 THE COURT: Oh, it sounds like me.

4 MR. NESSEL: I beg your pardon?

5 THE COURT: That sounds like me.

6 MR. NESSEL: Yeah. As I say a lot of times, I  
7 don't remember saying that, but it sounds like something I'd  
8 say.

9 You stated, "Don't give me that look because you have a  
10 duty to supplement. Okay?" And you continued, Your Honor.  
11 "If he", meaning Mr. Nessel, "didn't know about this *Fortune*  
12 matter, he couldn't put it in the notes. So, that doesn't  
13 get you anywhere. This may not go well for you if he", Mr.  
14 Nessel, "can demonstrate that he requested this information  
15 and that you did not provide it. You're on notice of that."  
16 Those are these Court's rules.

17 Your Honor, I know this Court pretty well. I've only  
18 had one trial in front of you. I know you don't speak  
19 lightly when you speak. I think your directives, they need  
20 to be taken seriously. What you stated on July 29th of 2020  
21 has come to fruition. I have proven that. And it shouldn't  
22 go well for her. That's why I filed this renewed motion.

23 And that's the whole point, is sanctions or, when the  
24 Court implied on July 29th of 2020 and what the Fourth  
25 Circuit affirmed or, excuse me, reversed and stated that on

1       July -- January 3rd of this year that, yes, misconduct under  
2       Rule 60(b) (3) did occur. I've stated this from the  
3       beginning. I believe I stated it in that motion on the  
4       early morning of July 30th.

5           I could possibly, possibly forgive Ms. Greve if she did  
6       not represent Tincher in the *Fortune* matter. She did. She  
7       had filed a responsive pleading. So, she was very well  
8       aware of this.

9           And if the Court can recall, I kind of made a stink  
10      about *Meade* not knowing that the *Meade* lawsuit against  
11      Tincher was filed. He alludes to it briefly in his  
12      discovery responses earlier, and I note that in my brief,  
13      but doesn't supplement like, hey, a lawsuit was filed  
14      against him. Regardless of the outcome of that, that's  
15      still discoverable information. I think the Court kind of  
16      chastised her on that on our phone conference right before  
17      the trial.

18           But even when armed with that in my arguments and my  
19      disdain for it she failed to consider to disclose to me  
20      under Rule 26(e), which she has to give me, which is this  
21      lawsuit was filed against Tincher.

22           I had this great outline I did for the Fourth Circuit,  
23      Your Honor. Kind of relied on it. It's just a timeline of  
24      what's going down and how this went down. There were like  
25      three months between Tincher's lawsuit and that day I found

1 out.

2 And just to refresh the Court's memory, we had rested

3 --

4 THE COURT: You mean *Fortune*.

5 MR. NESSEL: I beg your pardon?

6 THE COURT: You mean *Fortune's* lawsuit.

7 MR. NESSEL: The *Fortune* lawsuit, yes, sir, is  
8 that we were advised of it by *Fortune's* counsel, who just  
9 happened to be here that day. Had I not known about it or  
10 had he not been here, we probably never would have known  
11 about it.

12 But that's what we're talking about here, Your Honor.

13 Again, I'm sorry to kind of drag it out.

14 Ms. Greve also stated we didn't rely on, quote, "the  
15 law". Well, yeah, we did. We relied on the Rules of Civil  
16 Procedure.

17 THE COURT: Mr. Nessel, I really just have one  
18 question for you.

19 MR. NESSEL: Yes, sir.

20 THE COURT: You mentioned in your briefing that  
21 Ms. Greve has been sanctioned in other cases, but you didn't  
22 cite any of those. Do you have evidence of that?

23 MR. NESSEL: I believe one was in Boyd County,  
24 Your Honor. Mr. Saad may be able, if that's okay with the  
25 Court.

1 THE COURT: Well, here's the thing.

2 MR. NESSEL: Yes, sir.

10 I'm going to take this under advisement and allow that  
11 discovery to occur.

12                   In the meantime, Mr. Nessel, I want you to prepare a --  
13                   an accounting of your time and hourly rate and Mr. Saad's,  
14                   too, if he -- I don't know to what extent he was involved in  
15                   the appeal or not, but for plaintiff's counsel, I want a --  
16                   an accounting of your time and hourly rate for everything  
17                   flowing from this discovery failure, as I'll call it for the  
18                   time being, and if you all want to have discovery about  
19                   that, you can do that, as well. I think I need more of a  
20                   record to decide what I'm going to do here.

21 You can be seated.

22 MR. NESSEL: Oh, yes, sir. Thank you.

1 case is otherwise pretty well discovered?

2 And I guess that's a question for Mr. Slicer on the  
3 defense side.

4 MR. SLICER: Your Honor, it seems to me that the  
5 individuals that have knowledge concerning this would be Mr.  
6 Simmons, Ms. Greve, Mr. Tincher because, as I understand  
7 what the Court is interested in, it has to do with the *Meade*  
8 case and representations that were made about that during  
9 the trial.

10 THE COURT: And *Fortune*.

11 MR. SLICER: And the *Fortune* case. So, just at  
12 this moment, those are the only three that I can think of  
13 that we would need discovery from and/or affidavits. So,  
14 three -- three months, two months.

15 THE COURT: Two months?

16 MR. NESSEL: Two months would work, Your Honor. I  
17 have a third deposition of Mr. Tincher in the *Daniels*  
18 matter. And I did touch on this. I know Mr. Slicer may  
19 want to, you know, it's his client, but delve into it a  
20 little bit more by and through the same. I do have an  
21 excessive force expert I would disclose, if the Court  
22 permits me to do so.

23 THE COURT: Why would -- why would I allow you to  
24 disclose an expert at this juncture? We've already tried  
25 this case.

1 MR. NESSEL: I know. I just said if the Court  
2 would allow me to do so. Apparently, you're not. So --

3 THE COURT: Well, it sounds like I'm leaning that  
4 way.

5 MR. NESSEL: I can read you pretty well.

9 Now, having said that, here's what I think you all  
10 should strongly consider.

11 First of all -- please sit down, Mr. Nessel.

12                   First of all, I think the defense can expect, probably  
13 expect sanctions, and while those sanctions are very likely  
14 to be monetary and are very likely to be substantial, they  
15 are not -- monetary sanctions are not the only sanctions  
16 available to me. So, you all should give that careful  
17 consideration and further should give settlement careful  
18 consideration to avoid those issues. I hope you're hearing  
19 me.

20 Mr. Nessel --

21 MR. NESSEL: Your Honor.

22 THE COURT: You also should consider very  
23 carefully settling this case. I remember the settlement  
24 negotiations before this trial. Your demand was outrageous  
25 and not reasonable. And now that we've had a trial of this

1 case, I've seen the witnesses, including the Meade matter,  
2 and I found your client and his witnesses to be not  
3 particularly credible; not my decision, it's the jury's,  
4 obviously. I didn't find them to be particularly credible.  
5 You were able to present the Meade matter and you still got  
6 a defense verdict. If that doesn't make you reasonable,  
7 there's no way to make you reasonable.

8 MR. NESSEL: I'll be reasonable.

9 THE COURT: So, you need to think about settling  
10 this case, too.

11 MR. NESSEL: I understand, Your Honor.

12 THE COURT: Both sides have huge incentives at  
13 this point to settle this case for a reasonable amount. Is  
14 everybody hearing me?

15 MR. NESSEL: I hear you. I made a demand the day  
16 we had our scheduling conference three weeks, three days  
17 ago. I made it and Mr. Slicer responded. So, there's  
18 negotiations going on. I didn't -- your words didn't fall  
19 on deaf ears, Your Honor.

20 THE COURT: All right. Very good. Well, this is  
21 going to be a potentially unpleasant business if it doesn't  
22 get resolved. So, take that for what you will.

23 Mr. Slicer.

24 MR. SLICER: Your Honor, with the Court's  
25 indulgence, I am out the last two weeks of April. So, if we

1 can go a little beyond 60 days.

2 THE COURT: All right. That's fine. Three months  
3 is not unreasonable.

4 MR. SLICER: Okay, thank you.

5 THE COURT: That's fine. So, today is March 4th.  
6 We'll set a discovery cutoff around June 4th and we'll build  
7 out the scheduling order from there. That probably puts us  
8 at trial in October but, hopefully, hopefully, not  
9 necessary.

10 All right. Anything else we need to take up today?

11 MR. NESSEL: No, Your Honor.

12 MS. GREVE: No, Your Honor.

13 THE COURT: And, Ms. Greve, are you going to be  
14 withdrawing from the case as counsel?

15 MS. GREVE: Yes. I needed the hearing today in  
16 order to resolve this issue before I thought I would be  
17 permitted to withdraw and for relief to come in.

18 THE COURT: Have you noted an appearance, Mr.  
19 Slicer?

20 MR. SLICER: Yes, sir.

21 MS. GREVE: Yes.

22 THE COURT: I thought you had.

23 All right. If you'll go ahead and file your motion to  
24 withdraw, we will act on that.

25 MS. GREVE: Okay. Thank you, Your Honor.

